

**BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

HEATHER BAILEY and KEITH BROWN,

Appellants.

▽.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCFB NO. 93-8

ORDER GRANTING SUMMARY JUDGMENT

I

Respondent, the Department of Ecology ("Ecology"), filed with the Pollution Control Hearings Board ("Board"), on October 1, 1993, a Motion for Summary Judgment. The motion included three exhibits, including an Affidavit of Mark Jobson, and a Certificate of Mailing.

II

The parties, on October 13, 1993, filed a Stipulation and Order, which set forth the agreed facts in this dispute.

III

Appellants. Heather Bailey and Keith Brown, ("Bailey and Brown"), filed with the Board, on October 15, 1993, Appellants' Memorandum of Points and Authorities. Included in this filing were: the Last Will and Testament of Don Damon, step-grandfather of Brown; Affidavit of Ross Brown, father of Bailey and Brown; and a Certificate of Service

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IV

Bailey and Brown, on October 27, 1993, filed a Motion for Continuance Until Resolution of Summary Judgment. Ecology supported the motion. The Presiding Officer continued the matter, notifying the parties of his decision by telephone.

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The Board was comprised of Robert V. Jensen, attorney member, presiding; and Richard C. Kelley, member

VI

The Board, having reviewed the record submitted, rules as follows:

VII

The parties have stipulated to the material facts; therefore, there is no genuine issue of material fact. Thus, the question is whether the moving party, Ecology, is entitled to a judgment as a matter of law. CR 56(c), WAC 371-08-146.

VIII

The governing statute is RCW 90.14.180, which provides, in pertinent part, as follows.

Any person hereafter entitled to divert or withdraw waters of the state through an appropriation authorized under RCW 90.03.330, 90.44.080, OR 90.44.090 who abandons the same, or who voluntarily fails, without sufficient cause, to beneficially use all or any part of said right to withdraw for any period of five successive years shall relinquish such right or portion thereof, and such right or portion thereof shall revert to the state, and the waters affected by said right shall become available for appropriation in accordance with RCW 90.03.250

IX

Bailey and Brown argue that this statute does not apply to them by virtue of the "sufficient cause" exception. RCW 90.14.140(1) establishes several exceptions from the relinquishment of water rights.

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2 These are:

- 3 (a) Drought, or other unavailability of water;
4 (b) Active service in the armed forces of the United States during military crisis;
5 (c) Nonvoluntary service in the armed forces of the United States;
6 (d) The operation of legal proceedings;
7 (e) Federal laws imposing land or water use restrictions either directly or through
8 the voluntary enrollment of a landowner in a federal program implementing
9 those laws, or acreage limitations, or production quotas.

10 X

11 Specifically, Bailey and Brown urge that they come within the exceptions of
12 RCW 90.14.140(1)(d), or (e).

13 XI

14 The property was in a trust since sometime in 1981, until August 11, 1989. Prior to
15 termination of the trust, sometime in 1988, the trustee, Seafirst Bank ("Seafirst"), placed the
16 property into a Conservation Reserve Program ("CRP") with the United States Department of
17 Agriculture. Under the CRP, crops may not be grown and harvested upon the property, and
18 only a cover crop such as grass can be planted. The cover crop does not require irrigation. In
19 1998 and 1999, the property will be released from the CRP restrictions.

20 XII

21 Based on these facts, Bailey and Brown contend that relinquishment should not apply,
22 because the non-use was beyond their control. While that may, to some extent be true, the
23 reason it was beyond their control is because they had limited rights in the property; and at
24 least until the trust terminated, they were not the legal owners of either the property or the
25 water right appurtenant to it. We do not read RCW 90.14 140(1)(d) as protecting their rights
26 in this situation. The owner of the title to the property was, during the trust, the trustee,
27 Seafirst Bank. When it assumed its role as trustee, the land was dry land, and the well was

1 non-productive. Seafirst determined that the cost of redeveloping the well would have been
2 prohibitive. None of the beneficiaries challenged Seafirst's decision, even though the
3 relinquishment statute was in effect at the time. We note that under RCW 11.96.070(2),
4 Bailey and Brown, as beneficiaries of the trust, could have initiated a judicial proceeding to
5 "direct the personal representatives or trustees to do or abstain from doing any particular act in
6 their fiduciary capacity"

7 8 XIII

9 Had Bailey and Brown been unsuccessful in such an action, they might have fallen
10 under the umbrella of the legal proceeding exception. In any event, it is important to
11 recognize the limited rights which beneficiaries have in the management of trust property. In
12 State ex rel. Wirt v. Superior Court, 10 Wn.2d 362, 369, 116 P.2d 752 (1941), the Supreme
13 Court explained these limited rights as follows:

14 *A trust in real estate implies a holding of the legal title by one for*
15 *the benefit of another, who holds the equitable title - a separation*
16 *of legal estate from the beneficial enjoyment. The first object of a*
17 *trust is to limit the powers of the beneficiary and to deprive him*
of any power to manage the trust. A trust is the holding of
property subject to a duty of employing it or applying the
proceeds according to the directions given by the person from
whom it derived.

18 The limits on Bailey and Brown's right to irrigate these lands came not from a legal
19 proceeding, but rather are the legal result of the wishes of the former owner who put the land
20 in trust, to be managed by a third party

21 XIV

22 Legal proceedings are defined in Black's Law Dictionary 896 (6th ed. 1990) to include:

23 *all proceedings authorized or sanctioned by law, and brought or*
24 *instituted in a court or legal tribunal, for the acquiring of a right*
or the enforcement of a remedy.

1 The creation of a trust does not require the institution of any action in a tribunal. It may be
2 created, as here, in a person's will. Intervention by a tribunal is only necessary, as in the case
3 of contracts, where there is an unresolved dispute. The facts reveal no recourse to court over
4 this trust.
5

6 XV

7 Bailey and Brown next argue that the water right should not be relinquished because the
8 land was placed in a federal program which restricts its use, beginning in 1988. Thus, it is
9 argued, the exception of RCW 90.14.140(1)(e) applies.

10 XVI

11 We disagree. Since sometime prior to the termination of the trust, on August 11,
12 1989, the non-use of the water right has been the direct result of the restrictions imposed by
13 the United States Department of Agriculture, in the CRP agreement. This agreement was
14 entered into voluntarily by Seafirst Bank, the trustee, and the holder of legal title to the land.
15 These actions come within the exception of RCW 90.14.140(1)(e).

16 XVII

17 Nevertheless, Ecology is not required to bring its relinquishment action at any
18 particular time. The waters to which Ecology gives rights are public. RCW 90.03 005. The
19 private rights in these waters are always subject to the rights of other users and the public.
20 The legislature has declared that there can be no acquisition of rights to these waters by
21 prescription or adverse possession. RCW 90.14 220. Although no party has raised this issue,
22 we conclude that relinquishment of such waters, by non-use was never intended to constitute a
23 forfeiture, as that term is used in RCW 4 16.100(2). We decline to extend the rationale of the
24 case of U. S. Oil v. Department of Ecology, 96 Wn 2d 85, 633 P 2d 1324 (1981), (which
25 held that a civil penalty issued by Ecology was governed by RCW 4.16.100(2)), to cover the
26

1 relinquishment of water rights. In that case, the Supreme Court distinguishes between remedial
2 and penal actions. Id. at 96 Wn.2d 90. The purpose of water right relinquishment is not
3 punishment, but rather to ensure that the waters of the state, which are limited in nature, are
4 put to beneficial use. RCW 90.14.010.

5
6 XVIII

7 Based on the above analysis, the Board enters this:

8 ORDER

9 Ecology's motion for summary judgment is granted.

10 DONE this 24th day of November, 1993.

11 POLLUTION CONTROL HEARINGS BOARD

12 
13 ROBERT V. JENSEN, Presiding Officer

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15 RICHARD C. KELLEY, Member
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